A

Gan Kok Shang & Anor v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05-79–03 OF 2023
VAZEER ALAM, AHMAD ZAIDI IBRAHIM AND AZMI ARIFFIN JJCA
13 SEPTEMBER 2024

C

Criminal Procedure — Transfer of cases — Power of magistrate — Magistrate transferred case triable by High Court ('HC') to HC after prosecution sought repeated adjournments of mention date to obtain consent to prosecute from Public Prosecutor ('PP') — Whether HC was wrong to set aside magistrate's transfer order and remit case back to magistrate — Whether deputy public prosecutor's appearance in case from outset impliedly meant PP had given his consent to prosecute — Whether magistrate was right to transfer case to HC under s 177A(2) of the Criminal Procedure Code so that accused was accorded a speedy trial — Whether HC's setting aside of magistrate's transfer order denied accused of right to speedy trial protected by art 5 of the Federal Constitution — Whether denial of that right entitled accused to appeal against HC's decision within meaning of s 50(1) read with s 3 of the Courts of Judicature Act 1964

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The appellants were charged in the magistrate's court for an offence under s 109 read together with s 302 of the Penal Code. The appellants objected when the prosecution requested the court for a sixth mention date in order for the forensic report and the consent to prosecute from the Public Prosecutor ('PP') to be obtained. The magistrate refused to grant the adjournment and ordered the case to be transferred to the High Court ('HC'). The PP applied to the HC for a criminal revision of the magistrate's order. The HC allowed the application, set aside the magistrate's order and transferred the case back to the magistrate. In the instant appeal against the HC's decision, the prosecution raised a preliminary objection ('PO') that: (a) the decision of the HC was not appealable pursuant to s 50(1) read with s 3 of the Courts of Judicature Act 1964 ('the CJA') as it did not finally dispose of the rights of the parties; and (b) the appeal had become academic because the appellants' case was already transferred to the HC following the production of the PP's consent to prosecute.

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Held, unanimously dismissing the PO, allowing the appeal, setting aside the HC's decision and reinstating the decision of the magistrate:

I

(1) Section 177A(2) of the CPC mandated that the magistrate shall transmit a case that was exclusively triable in the High Court to the High Court 'as soon as may be practicable'. This was a manifestation of the appellants'

right to a speedy trial. This right was protected by art 5 of the Federal Constitution. The High Court's decision setting aside the magistrate's transfer order was final in its effect as it caused the appellants' right to a speedy trial to be delayed in that they were precluded from entering their plea to the charge and they had no other avenue to challenge that delay except by way of the instant appeal. The High Court's order caused substantial injustice and prejudice to the appellants. In the circumstances, the High Court's decision was appealable within the meaning of s 50(1) read together with s 3 of the CJA (see paras 30–32).

(2) The appellants argued that the appeal was not academic as the PP's consent to prosecute was not produced even at the time the notice of appeal was filed. Although the appeal might now be academic, it was of public interest and would be useful in the administration of justice. Hence, there was compelling justification for this court to exercise its jurisdiction to hear the instant appeal on its merits (see paras 39 & 41).

(3) The charge against the appellants was preferred by the deputy public prosecutor ('DPP') and the prosecution was initiated from the outset in the presence of the DPP. Therefore, there was implicit consent to prosecute from the PP as the DPP had the authority to act as the PP's alter ego. It was well within the magistrate's jurisdiction and power to transfer the case to the High Court under s 177A of the CPC. The High Court erred when it called up the case for revision and set aside the magistrate's order (see para 52).

[Bahasa Malaysia summary

Perayu-perayu telah didakwa di mahkamah majistret atas kesalahan di bawah s 109 yang dibaca bersama s 302 Kanun Keseksaan. Perayu membantah apabila pihak pendakwaan memohon kepada mahkamah untuk tarikh sebutan keenam untuk laporan forensik dan izin mendakwa daripada Pendakwa Raya ('TPR') diperolehi. Majistret enggan membenarkan penangguhan itu dan mengarahkan kes itu dipindahkan ke Mahkamah Tinggi ('MT'). TPR memohon kepada MT untuk semakan jenayah terhadap perintah majistret tersebut. MT membenarkan permohonan tersebut, mengenepikan perintah majistret dan mengembalikan kes itu kepada majistret. Dalam rayuan ini terhadap keputusan MT, pihak pendakwaan mengemukakan bantahan awal ('BA') bahawa: (a) keputusan MT tidak boleh dirayu menurut s 50(1) yang dibaca dengan s 3 Akta Mahkamah Kehakiman 1964 ('AMK') kerana ianya tidak melupuskan hak pihak-pihak; dan (b) rayuan telah menjadi akademik kerana kes perayu telah dipindahkan kepada MT memandangkan izin mendakwa TPR telah dikemukakan.

Diputuskan, sebulat suara mengenepikan BA, membenarkan rayuan dan mengekalkan keputusan majistret:

(1) Seksyen 177A(2) KPJ mewajibkan bahawa majistret hendaklah memindahkan kes yang boleh dibicarakan secara eksklusif di Mahkamah Tinggi kepada Mahkamah Tinggi 'secepat mungkin'. Hal ini untuk hak perayu untuk perbicaraan yang cepat. Hak ini dilindungi oleh perkara 5 Perlembagaan Persekutuan. Keputusan Mahkamah Tinggi yang mengenepikan perintah pemindahan majistret adalah muktamad kerana ianya menyebabkan hak perayu untuk perbicaraan ini dilambatkan kerana mereka dihalang daripada menyatakan pengakuan mereka kepada pertuduhan itu dan mereka tidak mempunyai jalan lain untuk mencabar kelewatan itu kecuali melalui rayuan ini. Perintah Mahkamah Tinggi menyebabkan ketidakadilan dan prejudis yang besar kepada perayu. Dalam keadaan tersebut, keputusan Mahkamah Tinggi boleh dirayu menurut s 50(1) dibaca bersama dengan s 3 AMK (lihat perenggan 30–32).

(2) Perayu menghujahkan bahawa rayuan tersebut tidak akademik kerana izin mendakwa TPR tidak dikemukakan walaupun pada ketika notis rayuan difailkan. Walaupun rayuan itu kini mungkin akademik, ianya adalah untuk kepentingan awam dan berguna untuk pentadbiran keadilan. Oleh itu, terdapat justifikasi yang meyakinkan mahkamah ini untuk menggunakan bidang kuasanya untuk mendengar rayuan ini berdasarkan meritnya (lihat perenggan 39 & 41).

(3) Pertuduhan terhadap perayu-perayu telah dikenakan oleh timbalan pendakwa raya ('TPR') dan pendakwaan telah dimulakan dari awal dengan kehadiran TPR. Oleh itu, terdapat persetujuan tersirat untuk mendakwa daripada TPR kerana TPR mempunyai kuasa untuk bertindak sebagai alter ego Peguam Negara. Ianya berada dalam bidang kuasa dan kuasa majistret untuk memindahkan kes itu ke Mahkamah Tinggi menurut s 177A KPJ. Mahkamah Tinggi terkhilaf apabila memanggil kes itu untuk semakan dan mengenepikan perintah majistret tersebut (lihat perenggan 52).]

Cases referred to

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831; [2014] 9 CLJ 289, FC (refd)

Ainsbury v Millington [1987] 1 All ER 929, HL (refd)

Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321; [1999] 1 CLJ 537, CA (refd)

Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (refd)

Loknath Padhan v Birendra Kumar [1974] SC 505, SC (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC (refd)

Mohamad Ridzuan bin Zamhor lwn Pendakwa Raya [2018] 6 MLJ 606; [2018] 4 CLJ 315; [2018] 2 AMR 17, CA (refd)
Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis [1975] 1 MLJ 93 (refd)
Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis [1975] 2 MLJ 198, FC (refd)
Perumal v PP [1970] 2 MLJ 265; [1970] CLJU 101; [1970] 1 LNS 101, FC (refd)
PP v Marwan bin Ismail [2008] 3 MLJ 51, CA (folld)
PP v Mohamed Shahabuddin Mohamed Ali & Ors [2019] 1 MLJ 520; [2018] 8 CLJ 535, CA (refd)
PP v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v PP [1985] 2 MLJ 436, SC (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129; [1998] 4 CLJ 575, CA (refd)
Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469, HL (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495; [2003] 2 CLJ 177, CA (refd)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran [2006] 6 MLJ 689, FC (refd)

Legislation referred to

Court of Judicature Act 1964 ss 3, 50(1), (2)
Criminal Procedure Code ss 177A, 177A(1), (2), 323
Dangerous Drugs Act 1952 ss 39B, 39B(3), 41A, 41A(1)
Federal Constitution art 5, 5(1)
Penal Code ss 109, 302, 354

Appeal from: *Pendakwa Raya lwn Gan Kok Shang dan satu lagi* [2022] MLJU 3626 (High Court, Klang)

Gobind Singh Deo (with Tiara Katrina Fuad) (Gobind Singh Deo & Co) for the first appellant.
Ho Cheng En (with Asyraaf Abu Bakar Hamzah) (TL Chen & Co) for the second appellant.
Syarifah Khairiah bt Syed Akmal (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azmi Ariffin JCA:

INTRODUCTION

[1] On 23 November 2021, the appellants were charged in the criminal magistrates' court in Klang for an offence under s 109 read together with s 302 of the Penal Code.

[2] Subsequent thereto, mention dates were held on 15 April 2022, 20 May 2022, 30 June 2022, 1 September 2022 and 12 October 2022 pending the production of the forensic report and public prosecutor's consent to prosecute. The learned counsel for the appellants objected to the request for a further postponement.

[3] The learned magistrate agreed and proceeded to transmit the appellants' cases to the High Court. The public prosecutor then filed a revision application against that decision.

[4] On 8 December 2022, the learned judicial commissioner allowed the respondent's/deputy public prosecutor's application, set aside the order of the learned magistrate and transferred the appellants' cases back to the magistrates' court.

[5] Dissatisfied, the appellants filed a notice of motion for leave to appeal to this honourable court based on three questions of law which was subsequently allowed on 3 March 2023.

[6] On 12 April 2023, the appellants filed petition of appeal.

[7] The hearing date for the appellants' appeal was fixed for 18 August 2023.

[8] On 15 August 2023, the learned deputy public prosecutor filed a notice of preliminary objection based on the grounds that the appellants' appeal is incompetent and has become academic.

[9] On 16 August 2023, the learned counsels for the appellants received the said Notice dated 11 August 2023 from the deputy public prosecutor vide email.

THE PROVISIONS OF LAW

[10] Section 50(1) of the Courts of Judicature Act 1964, which vests this honourable court with the jurisdiction to hear substantive appeals, states:

> 50 Jurisdiction to hear and determine criminal appeals
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any *decision* made by the High Court —
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[11] The word 'decision' is defined in s 3 of the Courts of Judicature Act 1964 as meaning:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[12] Section 177A of the Criminal Procedure Code provides:

> 177A Transmission of case to, and trial by, the High Court
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> (1) A prosecution in respect of an offence which is to be tried by the High Court accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:
>
> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.
>
> (2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before that Court as soon as may be practicable:
>
> Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.
>
> (3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

[13] Section 39B of the Dangerous Drugs Act 1952 states as follows:

> 39B Trafficking in dangerous drugs
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> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.
>
> (3) A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor:

Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.

(4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly.

[14] Section 41A of the Dangerous Drugs Act 1952 states:

41A Special provisions relating to transmission of a case to, and trial by, the High Court

(1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

(2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.

(3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.

(4) Subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

[15] Article 5(1) of the Federal Constitution states:

5 Liberty of the person

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

Findings of the High Court on revision

[16] The learned judicial commissioner concluded, inter alia, as follows:

[1] Ini adalah permohonan oleh pendakwa raya untuk membuat semakan di bawah s 323(1) Kanun Tatacara Jenayah ('KTJ') untuk menyemak kembali keputusan yang dibuat oleh Tuan Majistret Mahkamah Majistret Klang pada 12 Oktober 2022 yang memerintahkan kes yang melibatkan dua OKT ini dipindahkan ke

A Mahkamah Tinggi Klang tanpa pengemukaan izin mendakwa daripada pihak pendakwaan.

[2] ... [4]

[5] Undang-undang berkaitan prosedur jenayah yang melibatkan kesalahan yang lazimnya Mahkamah Tinggi mempunyai bidangkuasa untuk mendengar dan memutuskan maka izin pendakwaan hendaklah diperolehi terlebih dahulu sebelum kes itu dipindahkan ke Mahkamah Tinggi telah diperuntukkan dengan khusus di bawah s 177A Kanun Tatacara Jenayah memandangkan pertuduhan yang dihadapi oleh kedua-dua OKT adalah di bawah s 302 dibaca bersama dengan s 109 Kanun Keseksaan.

[6] ...

[7] Objektif kepada izin mendakwa ini diperjelaskan oleh YA Dato' Abdull Hamid Embong JCA Di dalam kes *Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51; [2008] 3 AMR 9:

> The consent of the public prosecutor is a public policy requirement which Parliament provided for the safeguard of the accused person.

[8] Konsep izin pendakwaan di dalam kes *Public Prosecutor v Marwan bin Ismail* walaupun sama kaedahnya dengan s 177A Kanun Tatacara Jenayah namun terdapat sedikit perbezaan apabila melibatkan kuasa untuk memindahkan kes. Di dalam kes *Marwan bin Ismail* izin pendakwaan yang dimaksudkan adalah di bawah s 41A Akta Dadah Berbahaya 1952 kerana OKT dituduh di bawah s 39B(1) yang memperuntukkan:

> (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or to be brought before such Court as soon as may be practicable.

[9] Seksyen 41A ADB memberi kuasa untuk memindahkan kes ke Mahkamah Tinggi adalah pada mahkamah manakala s 177A Kanun Tatacara Jenayah, kuasa untuk memindahkan kes adalah pada pendakwa raya melalui izin pendakwaan.

[10] Di dalam kes *Public Prosecutor v Tiong King Guan & Anor* [2015] 4 MLJ 235; [2015] 3 CLJ 48 membincangkan tugas mahkamah rendah apabila melibatkan kes yang di bawah bidang kuasa Mahkamah Tinggi. Didalam kes ini mahkamah sesyen telah melepaskan tanpa dibebaskan OKT untuk satu kesalahan membunuh di bawah s 302 Kanun Keseksaan sedangkan mahkamah sesyen tidak mempunyai bidangkuasa untuk membuat perintah sedemikian. Mahkamah Rayuan memutuskan seperti berikut:

> [35] What the sessions court and the High Courts did in the present case was to practically deny the public prosecutor of his discretionary power and constitutional right to proceed under s 302 read with ss 109 and 34 of the Code. The procedure is that when a charge for an offence triable by the High Court is tendered before a subordinate court, the duty of the magistrate or sessions court

judge is to simply transmit the case to the High Court pursuant to s 177A of the CPC.

[36] Clearly it was beyond the jurisdiction of the learned sessions court judge to question and to decide on the legal technicalities of the charge ...

[11] Adalah jelas daripada otoriti di atas, majistret hanya boleh memindahkan kes ke Mahkamah Tinggi setelah pendakwa raya menjalankan kuasa yang diberi di bawah s 177A KTJ iaitu dengan mengemukakan izin pendakwaan.

[12] ... [13]

[14] Kesimpulan yang boleh dibuat berdasarkan otoriti-otoriti yang dikemukakan adalah mahkamah majistret tugasnya selaras dengan s 117A KTJ adalah hanya sebagai medium untuk memindahkan kes bagi kesalahan yang merupakan bidang kuasa asal Mahkamah Tinggi kepada Mahkamah Tinggi hanya selepas pihak pendakwaan mengemukakan izin yang diperlukan di bawah s 177A KTJ.

[15] Oleh itu, mahkamah ini membenarkan semakan keputusan oleh pihak pendakwa raya atas keputusan majistret yang memindahkan kes ini ke Mahkamah Tinggi tanpa izin pendakwaan selaras dengan kehendak s 177A KTJ. Kes ini diremitkan kembali ke mahkamah majistret sementara menunggu izin pendakwaan di bawah s 177A KTJ sebelum memindahkan kes ini semula ke Mahkamah Tinggi untuk didengar dan diputuskan.

QUESTIONS OF LAW RAISED BY THE APPELLANTS

Question 1: Whether the principle distilled in the case of *Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51: (i) that a prosecution only commences when a charge is read to the accused and he enters a plea in relation thereto; and (ii) that as such, there is no bar to transferring his case exclusively triable in the High Court to the High Court under section 41A of the Dangerous Drugs Act 1952 without the production of the public prosecutor's consent, applies to cases involving section 177A of the Criminal Procedure Code.

Question 2: Whether, in order to protect an accused person's right to a speedy trial as enshrined in Article 5 of the Federal Constitution, a case which is exclusively triable in the High Court may be transferred to the High Court without the Public Prosecutor's consent?

Question 3: Whether a Magistrates' Court has the power and/or jurisdiction to order an accused to be further remanded in custody merely to await the Public Prosecutor's consent?

PETITION OF APPEAL

[17] Before us, the learned counsel for the appellants raised three grounds of appeal which are reproduced herein:

(1) *Sama ada prinsip yang diturunkan di dalam kes Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51: *(i) bahawa suatu pendakwaan hanya bermula apabila pertuduhan dibacakan kepada tertuduh dan beliau dipanggil untuk memasukkan pengakuannya; dan (ii) bahawa oleh itu, tiada halangan untuk memindahkan kes yang*

A *hanya boleh dibicarakan di Mahkamah Tinggi ke Mahkamah Tinggi tersebut di bawah seksyen 41A Akta Dadah Berbahaya 1952 tanpa pengemukaan izin Pendakwa Raya, adalah terpakai kepada kes-kes yang melibatkan seksyen 177A Kanun Prosedur Jenayah?*

B (1A) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Yang Arif Hakim terikat di bawah prinsip stare decisis untuk mengguna pakai prinsip undang-undang yang telah diturunkan oleh Mahkamah Rayuan di dalam kes *Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51 bagi kes-kes Perayu-Perayu yang tersebut di atas;

C (1B) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk memutuskan bahawa prinsip undang-undang yang telah diturunkan oleh Mahkamah Rayuan di dalam kes *Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51 adalah terpakai dalam kes-kes yang melibatkan seksyen 177A Kanun Prosedur Jenayah;

D (1C) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila bergantung kepada kes *Public Prosecutor v Oladutun Lukmaru Umaru & Ors* [1991] 1 MLJ 187 dalam menyatakan bahawa Mahkamah Majistret hanya bertugas sebagai medium untuk memindahkan kes ke Mahkamah Tinggi dan hanya boleh melakukan sedemikian setelah pihak Pendakwa Raya mengemukakan izin yang diperlukan di bawah seksyen 177A Kanun Prosedur Jenayah dalam keadaan di mana nas undang-undang yang telah diturunkan di dalam kes *Public Prosecutor v Oladutun Lukmaru Umaru & Ors* [1991] 1 MLJ 187, iaitu kes Mahkamah Tinggi, telah secara nyatanya ditolak oleh Mahkamah Yang Mulia ini di dalam kes *Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51;

F (1D) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fkata dan undang-undang apabila memutuskan bahawa terdapat perbezaan di antara kuasa Mahkamah Majistret untuk memindahkan kes ke Mahkamah Tinggi di bawah seksyen 41A dibaca bersama seksyen 39B Akta Dadah Berbahaya 1952 tanpa pengemukaan izin oleh pihak Pendakwa Raya berbanding dengan kuasa Mahkamah Majistret untuk melakukan perkara yang sama di bawah seksyen 177A Kanun Prosedur Jenayah; dan

G (1E) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk memutuskan bahawa (i) suatu pendakwaan hanya bermula apabila pertuduhan dibacakan kepada tertuduh dan beliau dipanggil untuk memasukkan pengakuannya dan (ii) bahawa oleh itu, tiada halangan untuk memindahkan kes yang hanya boleh dibicarakan di Mahkamah Tinggi ke Mahkamah Tinggi tersebut di bawah seksyen 177A Kanun Prosedur Jenayah tanpa pengemukaan izin Pendakwa Raya.

H (2) *Sama ada, bagi memelihara hak seseorang tertuduh untuk suatu perbicaraan yang cepat dan pantas sepertimana yang termaktub di dalam Perkara 5 Perlembagaan Persekutuan, suatu kes yang hanya boleh dibicarakan di Mahkamah Tinggi boleh dipindahkan ke Mahkamah Tinggi tersebut tanpa pengemukaan izin Pendakwa Raya?*

I (2A) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa tafsiran Yang Arif Hakim berkenaan seksyen 177A Kanun Prosedur Jenayah di mana telah diputuskan

bahawa kuasa adalah terletak pada pihak Pendakwa Raya untuk memindahkan kes yang hanya boleh dibicarakan di Mahkamah Tinggi ke Mahkamah Tinggi melalui izin yang diperlukan melanggar hak seseorang tertuduh kepada satu perbicaraan yang cepat dan pantas sepertimana yang termaktub di bawah Perkara 5 Perlembagaan Persekutuan;

(2B) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa Perayu-Perayu yang tersebut di atas telah ditahan reman semenjak bulan November 2021 dan oleh itu, adalah mustahak agar kes-kes Perayu-Perayu yang tersebut di atas dipindahkan ke Mahkamah Tinggi secepat yang secara munasabahnya boleh dilaksanakan untuk memulakan proses pendakwaan mereka bagi memelihara hak Perayu-Perayu kepada satu perbicaraan yang cepat dan pantas sepertimana yang termaktub di bawah Perkara 5 Perlembagaan Persekutuan; dan

(2C) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk mengambil kira bahawa Perkara 145 Perlembagaan Persekutuan tidak membenarkan Pendakwa Raya untuk melengah-lengahkan perbicaraan seseorang tertuduh hanya atas sebab izin yang dimaksudkan di dalam seksyen 177A Kanun Prosedur Jenayah belum dapat dikemukakan kerana ianya akan menyebabkan pelanggaran hak tertuduh-tertuduh di bawah Perkara 5 Perlembagaan Persekutuan.

(3) *Sama ada Mahkamah Majistret mempunyai kuasa dan/atau bidangkuasa untuk memerintahkan agar seseorang tertuduh hendaklah terus ditahan reman hanya sambil menunggu pengemukaan izin Pendakwa Raya?*

(3A) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Mahkamah Majistret hanya mempunyai kuasa untuk memindahkan kes ke Mahkamah Tinggi menurut seksyen 177A Kanun Prosedur Jenayah hanya selepas pengemukaan izin oleh pihak Pendakwa Raya;

(3B) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila gagal untuk memutuskan bahawa Mahkamah Majistret tidak mempunyai kuasa dan/atau bidangkuasa untuk memerintahkan agar seseorang tertuduh ditahan reman hanya sementara menunggu pengemukaan izin oleh pihak Pendakwa Raya; dan

(3C) Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi fakta dan undang-undang apabila memerintahkan agar kes Perayu-Perayu diremitkan balik ke Mahkamah Majistret sementara menunggu pengemukaan izin pendakwaan di bawah seksyen 177A Kanun Prosedur Jenayah sebelum memindahkan kes-kes Perayu-Perayu yang tersebut di atas semula ke Mahkamah Tinggi.

PRELIMINARY OBJECTION RAISED BY DEPUTY PUBLIC PROSECUTOR

[18] Based on the question of law posed above, the learned deputy public prosecutor then filed a notice of preliminary objection premised on two following grounds:

(a) that the order of the learned High Court judge on revision dated 8 December 2022 setting aside the order of the learned magistrate dated 12 October 2022 transferring the appellants' cases to the High Court pursuant to s 177A of the Criminal Procedure Code and thereafter remitting those cases back to the magistrates' court was not a 'decision' within the meaning of s 50(1) read together with s 3 of the Courts of Judicature Act 1964; and

(b) that the appellants' appeal has become academic and nugatory in light of the fact that their cases in the magistrates' court have been transferred to the High Court subsequent to the production of the public prosecutor's consent on 6 April 2023.

OUR DECISION ON PRELIMINARY OBJECTION

Whether the High Court order was a final order

[19] In essence, the learned deputy public prosecutor argues that the appellants' rights have not been finally disposed because the trial has not even commenced. The High Court order did not finally dispose of the rights of the appellants within the meaning of s 3 of the Courts of Judicature Act 1964 and hence not appealable. Furthermore, the matter has already become academic in light of the fact that their cases in the magistrates' court have been transferred to the High Court subsequent to the production of the public prosecutor's consent on 6 April 2023.

[20] On the other hand, learned counsel for the appellants submit that the High Court order was a final order because it finally disposed of the appellants rights within the meaning of s 3 of the Courts of Judicature Act 1964.

[21] It was further argued that the appellants' appeal is not academic because at the point of filing the notice of appeal, the questions of law posed vide the appellants' notice of appeal were still a live issue. Alternatively, even if the said appeal has become academic (which is denied), this honourable court ought to nevertheless proceed to hear the same on its merits.

[22] Before we decide on this issue, it is pertinent to looked at the principles of law governing the meaning of the word 'decision' as stated in s 50(1) of the Courts of Judicature Act 1964 read together with s 3 of the same Act.

[23] In our view, the wording of s 3 of the Courts of Judicature Act 1964 are clear and unequivocal where the right of appeal against any decision of the High Court in respect of criminal matter does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties (see *Syarikat Tingan Lumber Sdn Bhd*

v Takang Timber Sdn Bhd [2003] 2 MLJ 495; [2003] 2 CLJ 177; *Mohamad Ridzuan bin Zamhor lwn Pendakwa Raya* [2018] 6 MLJ 606; [2018] 4 CLJ 315; [2018] 2 AMR 17).

[24] Way back in 1998, one of the leading local authority on this subject is the Court of Appeal decision in *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129; [1998] 4 CLJ 575. In that case there was a joint application by the two applicants for leave to appeal to the Court of Appeal under s 50(2) of the Courts of Judicature Act 1964 ('Act 91'). In essence, on 11 January 1995 each of the applicants was preferred with a charge for an offence of using criminal force on a female adult under s 354 of the Penal Code. They were jointly tried and the learned magistrate on 1 September 1996 acquitted and discharged both the applicants at the end of the case for the prosecution. The learned deputy public prosecutor appealed. On 2 April 1997 the appeal was heard and the learned judge of the High Court, Alor Setar allowed the appeal with the order that both the applicants were to enter their defence before the learned magistrate. They were not satisfied with the decision of the learned judge and so they prayed that they be granted leave to appeal to this court.

[25] The Court of Appeal speaking through Lamin Mohd Yunus PCA (as he then was) said (at p 586):

> The order of the High Court in the present case for which leave to appeal is sought was that the applicants were to enter their defence. At the stage of making the order, certainly it has no finality in its intent. Only after the close of the defence as a result of that order will there be finality. Only after the close of the defence will there be a decision to 'affect the event of the appeal', meaning that the defence story will finally determine the result of the whole case which was the purpose of the appeal.

Continuing at p 597, His Lordship said:

> So, for the purpose of s 50(2) of the CJA, this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

[26] In the *Public Prosecutor v Raymond Chia Kim Chwee & Anor; Zainal bin Hj Ali v Public Prosecutor* [1985] 2 MLJ 436 the Supreme Court held as follows:

> With regard to the first question, under s 307(i) the Criminal Procedure Code any person dissatisfied with any judgment, sentence or order pronounced by any magistrate's court in a criminal case to which he is a party may appeal to the High Court against any such judgment, sentence or order. The word 'order' is preceded by the word's 'judgment' and 'sentence'. The order must therefore be a final order in the sense that it is final in its effect as in the case of a judgment or a sentence. The test for determining the finality of an order is to see whether the judgment or order

finally disposes of the rights of the parties.

[27] In the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; [1999] 1 CLJ 537, the Court of Appeal speaking through NH Chan JCA (as he then was) held as follows:

> In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by *Halsbury's Laws of England* (4th Ed) para 506 at p 240, which reads:
>
> Interlocutory judgments and orders.
>
> An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and give no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment and merely directs how declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory.
>
> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals. Shortly stated, what the amendment means is that judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 Courts of Judicature Act, and therefore is not appealable.

[28] In the case of *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831; [2014] 9 CLJ 289, the Federal Court held as follows:

> [38] ... The new definition of the word decision in the amended s 3 of the CJA which we have laid emphasis to in the preceding paragraph does not include a judgment, order or ruling which does not finally dispose of the rights of the parties on the matters in dispute. With the amended s 3 of the CJA, appeals filed based on technical rulings which are interlocutory in nature are now things of the past. Such appeals are incompetent to be laid before the appellate court as it is clearly precluded by law.

[29] In the case of *Public Prosecutor v Mohamed Shahabuddin Mohamed Ali & Ors* [2019] 1 MLJ 520; [2018] 8 CLJ 535, the Court of Appeal speaking through Mohd Zawawi Salleh JCA (as he then was) held as follows:

> [23] So too here. We are of the considered opinion that the decision of the learned trial judge in reducing the charge from the offence of murder under s 302 of the Penal Code to one of culpable homicide under s 304(a) of the same Code and in calling the respondents to enter their defence on the amended charge is not a decision within the meaning of s 3 of the CJA and, therefore, is not appealable.
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> [24] In this instant appeal, the respondents were scheduled to plead on amended charge on 7 September 2017. However, the trial was postponed due to the appeal filed by the PP against the decision of the learned trial judge in amending the charge. Certainly, the decision of the learned trial judge has not finally disposed of

the rights of the parties. The learned trial judge had not made a final determination of the rights of the parties at this stage. Something still had to be done by the learned trial judge, ie, to hear the respondents' defence and make a decision pursuant to s 182A of the Criminal Procedure Code. Only a decision at the close of the defence case would effectively dispose of the rights of the parties. Further, to have a final decision in this case, the respondents must be convicted and sentenced or discharge and acquitted, as the case may be. It would, in our view, be incongruous to allow the PP to appeal to this court before the final judgment is meted out by the trial court.

[25] Our courts have applied a 'salutary general rule' in criminal and civil proceedings for many years that appeals are not entertained piecemeal. Decision of the High Courts has generally been held to be appealable only if they have three attributes. They must be final in effect, definitive of the rights of the parties, effectively dispose of a substantial part of the relief claimed in the main proceedings and it does not leave anything to be done in the trial with respect of the merits of the case. In other words, the rule, in general, permits an appeal to be taken only from a final decision which disposes of all the issues presented in the trial. Quite obviously, all the issues in the case at bench were not disposed of if the respondents have yet to testify in their defence.

[30] Accordingly, based on the foregoing cases and the principles of law expounded as guidelines and after a careful scrutiny of the record and the submissions made, we are of the considered view, that s 177A(2) of the Criminal Procedure Code mandated that the magistrates' court shall transmit a case exclusively triable in the High Court to the High Court 'as soon as may be practicable', is a manifestation of the right to a speedy trial.

[31] The High Court order, which set aside the learned magistrates' order transferring the appellants' case to the High Court and remitted their case back to the magistrates' court was final in its effect with regards to the right to a speedy trial as protected by art 5 of the Federal Constitution because it certainly caused a further delay of the appellants' right to a speedy trial in that they were precluded from entering their plea to the charge and there is no other mechanism by which the appellants are able to challenge that delay. This has adversely impacted their right, caused prejudice and substantial injustice to them. There is no other avenue other than this appeal to challenge the same. Hence, the High Court did finally dispose of that right within the meaning of s 3 of the Court of Judicature Act 1964.

[32] For these reasons, we conclude that the High Court order was a 'decision' within the meaning of s 50(1) read together with s 3 of the said Act, and this honourable court is vested with the jurisdiction to determine the substantive appeal on its merits. The deputy public prosecutor's first preliminary objection is dismissed.

Whether the appellants' appeal is academic

[33] As said, the learned deputy public prosecutor argued that the appellants' appeal is incompetent and has been rendered academic and nugatory. Hence, the matter in actual controversy between the parties is no longer a living issue. The learned deputy public prosecutor place reliance in a number of decided authorities to support their contention.

[34] In *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 the Federal Court speaking through Augustine Paul FCJ (as he then was) held as follows:

> In dealing with the circumstances in which an appeal will be rendered academic and thereby not appealable *Viscount Simon LC said in Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 at pp 470–471: I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case In deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing is between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue. *The test, therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way*. If the answer to the question is in the affirmative the appeal cannot be said to have become academic. This test has found favour with a plethora of local cases such as *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; [1992] 1 CLJ 36; [1992] 1 CLJ Rep 212; *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257; [1997] 1 CLJ 325 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513; [2003] 1 CLJ 61.

[35] In *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 Viscount Simon LC, speaking for the House of Lords, said (at p 470):

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

[36] In *Ainsbury v Millington* [1987] 1 All ER 929, Lord Bridge, having cited the passage by Viscount Simon LC above, said at pp 930–931 said:

> It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

[37] In *Loknath Padhan v Birendra Kumar* [1974] SC 505 the Supreme Court of India held as follows:

> It is a well settled practice recognized and followed in India that if an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be a waste of public time and indeed not a proper exercise of authority for the court to engage itself in deciding it. Justice Bagwati, in his judgment, said: ... it would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the other. The court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.

[38] On the other hand, the appellants contend that their appeal is not academic as there is still a matter to be decided by this honourable court; or alternatively even if their appeal has become academic this honourable court is still vested with the jurisdiction to determine the substantive appeal.

[39] The appellants further contend that the pertinent time for consideration is the time at which the notice of appeal was filed, namely, 3 March 2023. At this stage, the public prosecutor had not yet produced its consent for the purposes of s 177A of the Criminal Procedure Code and up to that point the appellants' cases were still in the magistrates' court. As a result, it is argued that the appellants' appeal is not academic because at the point of filing the notice of appeal, the questions of law posed vide the appellants' notice of appeal were still a live issue. Alternatively, even if their appeal has become academic, this honourable court may and ought to nevertheless proceed to hear the same on its merits because there is an issue involving public interest that need to be resolved because a large number of similar cases existed or anticipated.

[40] Reference was made to the Federal Court case of *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 6 MLJ 689, where Augustine Paul FCJ (as he then was) after directly referencing His Lordship's own earlier decision in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 and *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257, proceeded to determine the matter before the court on its merits

even after it was found that there no longer existed a *lis* between the parties:

> [4] In the recent judgment of this court in *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, this court dealt with the circumstances in which a pending matter may be rendered academic at pp 120–121 in the following terms:
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> In dealing with the circumstances in which an appeal will be rendered academic and thereby not appealable, Viscount Simon LC said in *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 at pp 470–471:
>
> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties. I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.
>
> The test, therefore, in deciding whether an appeal has become academic is to determine whether there is in existence a matter in actual controversy between the parties which will affect them in some way. If the answer to the question is in the affirmative the appeal cannot be said to have become academic. This test has found favour with a plethora of local cases such as *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh* [1992] 1 MLJ 147; *Datuk Syed Kechik bin Syed Mohamed & Anor v Board of Trustees of the Sabah Foundation & Ors* [1997] 1 MLJ 257 and *Raphael Pura v Insas Bhd & Anor* [2003] 1 MLJ 513.
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> ...
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> [5] The resultant matter for consideration is whether the appeal must still be heard in the public interest. In considering the circumstances in which a pending matter which has since become academic may still be heard Lord Slynn of Hadley said in *R v Secretary of State for the Home Dept; ex parte Salem* [1999] 2 All ER 42 at p 47:
>
> > My Lords, I accept, as both counsels agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v Millington* (and the reference to the latter in r 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
> >
> > The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will

most likely need to be resolved in the near future.

[41] Having considered the submissions and the authorities, we find that although the issue may be academic, it is one of public interest and would be useful in the administration of justice. Hence, there is compelling justification for this court to exercise its jurisdiction to hear the appeal on its merits. We therefore find that the second preliminary objection raised by the learned deputy public prosecutor is also without merits and accordingly, we dismiss the preliminary objection.

[42] Now, that the pressing preliminary objection issue is settled and put to bed, we shall now move on to the three questions of law raised. For ease of reference, the said questions are reproduced below:

('Question 1')

Whether the principle distilled in the case of *Public Prosecutor v Marwan bin Ismail* [2008] 3 MLJ 51: (i) that a prosecution only commences when a charge is read to the accused and he enters a plea in relation thereto; and

(ii) that as such, there is no bar to transferring his case exclusively triable in the High Court to the High Court under s 41A of the Dangerous Drugs Act 1952 without the production of the public prosecutor's consent, applies to cases involving s 177A of the Criminal Procedure Code.

[43] Before we deal with Question 1, it is important again for us to refer to the case of *Marwan bin Ismail* where the Court of Appeal speaking through Abdull Hamid Embong JCA held as follows:

[1] The sole question for our decision is simply what a magistrate needs to do in a case where an accused person who is tentatively charged for drugs trafficking under s 39B(1) of the Dangerous Drugs Act is brought up before him for a mention.

[2] The High Court at Shah Alam had called up this matter for a revision. The learned judge set aside the order of the magistrate who had earlier remanded the accused for a further period of two months when his case was brought up before the magistrate for an initial mention. The reason given for the further remand was that the chemist report on the drugs which was the subject matter of a tentative charge for trafficking under s 39B(1) of the Dangerous Drugs Act 1952 ('the DDA') against the accused was not ready. As such the magistrate withheld the transmission of the case to the High Court.

[3] Both the learned deputy public prosecutor and the accused person were represented and advanced submissions at the revision proceedings before the High Court. The learned judge concluded that to further remand the accused person for another two months was unlawful and amounted to the usurpation of a judicial function by the prosecution. The learned judge then revised the order made by the magistrate (for a further remand of the accused) pursuant to his power of revision under s 325 of the Criminal Procedure Code ('the CPC'). The High Court then ordered that the accused be reproduced before the magistrate to reconsider whether

A the case should be transmitted to the High Court under s 41A of the DDA or alternatively for his discharge pursuant to s 29 of the CPC.

[4] Against that order the learned public prosecutor appealed to this court.

[5] Before us the learned deputy public prosecutor argued that the magistrate has no power to transmit the case to the High Court without the consent of the public prosecutor under s 39B(3) of the DDA.

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[6] ...

[7] ...

[8] It was further submitted that it would be unfair to subject an accused person to a charge under this section if the weight of the drugs had not been determined upon an analysis by the chemist. As such s 41A of the DDA should be read subject to s 39B(3) of the DDA.

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[9] Our understanding of the learned DPP's submission is that in short, the prosecution of an accused person for an offence of drugs trafficking under s 39B(1) of the DDA should be put on hold until a consent of the public prosecutor has been given. The accused person may then, pending that consent be remanded in custody, and that s 41A of the DDA till then, cannot be applied.

D

[10] ...

E [12] ...

[13] In our view therefore, this special provision governs the procedure to be followed in respect of a person charged under s 39B(1) of the DDA. The magistrate has no option but to strictly adhere to the steps to be undertaken thereunder. If an accused person charged for an offence under s 39B(1) of the DDA is produced before a magistrate, he must do the following:

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(i) have the charge read to him;

(ii) explain to him the charge;

(iii) not to record any plea by the accused, even if he chose to make one.

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(iv) transmit the case to the High Court; and

(v) cause the accused person to be brought before the High Court as soon as is practicable.

H [14] It may be noted that the reference to the preliminary inquiry in the section is now superfluous since Chapter XVII of the CPC has now been repealed (see Act A 908 wef 17 February 1995).

[15] Section 39B(3) of the DDA, deals with a step in the prosecution of an accused person charged under s 39B(1) of the DDA. The consent of the public prosecutor is a public policy requirement which Parliament has provided for the safeguard of the accused person. In practice this step is undertaken by producing a letter of consent from the public prosecutor (or a deputy public prosecutor pursuant to s 376 of the CPC, since the consent of the public prosecutor under s 39B(3) is in effect, not a personal power), before the High Court upon the commencement of the trial. It must be emphasised that once the case has been transmitted to the High Court,

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the provisions regarding trials before the High Court as provided in Chapter XX of the CPC takes effect.

[16] Section 41A of the DDA is a special provision under a special law which operates independently of any other provisions. It provides for a convenient procedure whereby one who is charged with a capital offence under the DDA which is triable only by a High Court may be produced before 'the appropriate subordinate court' (note that it need not be a magistrate court) in order to obtain an order for transmission. Once produced, that court is under a mandatory obligation to order a transmission of the case. This is the clear directive of the Supreme Court in *Lee Chan Sang*.

[17] The prosecution of the case on the other hand begins in the High Court, when the charge is read and the accused is asked to plea to it (see *Perumal v Public Prosecutor* [1970] 2 MLJ 265; [1970] CLJU 101; [1970] 1 LNS 101).

[18] Thus giving a consent or the withholding of it, being a prosecutorial power, may be exercised even at that stage. The exercise of this power by the public prosecutor is in our view unconnected with the special procedure for transmission under s 41A of the DDA. We cannot therefore accept the proposition that s 41A has to be read subject to s 39B.

[19] With respect, we cannot agree with and hold it as wrong, the view in *Public Prosecutor v Oladotun Lukmanu Umaru & Ors* that the act of a magistrate of transmitting the case to the High Court under s 41A is a further step in the prosecution. In our view, the prosecution of the case, following *Perumal*, begins only at the High Court. Similarly, we would also hold that the ruling of the learned judge in *Ilamaran Kanniappan* that an accused person in that situation may be remanded in custody pending the outcome of the analysis of the drugs to be wrongly decided. The DDA does not empower a magistrate to remand an accused person tentatively charged for trafficking under s 39B(1).

[20] For these reasons, this appeal is dismissed. However, upon our deliberation of the learned judge's order, we are minded to also set that aside and in place make an order that this case be remitted to the magistrate court to make an order under s 41A of the DDA.

[44] In *Perumal v Public Prosecutor* [1970] 2 MLJ 265; [1970] CLJU 101; [1970] 1 LNS 101, Azmi LP (as he then was) in delivering the judgment of the Federal Court held as follows:

But we agree with *Dato' Marshall* that where the public prosecutor or his deputy prosecutes from the inception under the provisions of the Act there is necessarily an implied consent to the prosecution, but where he does not do so and yet the accused is called upon to plead, consent by the public prosecutor given subsequently does not validate the institution of the prosecution unless the court is satisfied that he or a colleague has in fact given such consent prior to the moment of plea.

Section 26 does not say that the consent must be in writing. So, it may be in writing or oral. Indeed, in *Public Prosecutor v Oie Hee Koi & Associated Appeals* [1968] 1 MLJ 148 and associated appeals Lord Hodson giving the advice of the Privy Council said that the public prosecutor's consent is implicit if he is himself the

prosecutor. Lord Hodson said at p 154:

> It was further argued that under s 80 of the [Internal Security] Act the consent of the public prosecutor to the prosecution should have been and was not obtained. The answer to this objection is that the public prosecutor was himself the prosecutor and his consent is implicit in his action.

[45] As outlined above, the Court of Appeal in *Marwan bin Ismail* held that the power to transfer cases to the High Court under s 41A(1) of the Dangerous Drugs Act 1952 is not subject to the prohibition under s 39B(3) of the said Act because a prosecution only commences when a charge is read to an accused and he enters his plea in relation thereto. Similarly, the power to transfer cases to the High Court under s 177A(2) of the Criminal Procedure Code is not subject to the prohibition under s 177A(1) of the said Code for the same reason. As such, the act of transferring the appellants' cases to the High Court was not in breach of s 177A(1) of the Criminal Procedure Code:

> ('Question 2')
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> Whether, in order to protect an accused person's right to a speedy trial as enshrined in art 5 of the Federal Constitution, a case which is exclusively triable in the High Court may be transferred to the High Court without the public prosecutor's consent?
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> ('Question 3')
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> Whether a magistrates' court has the power and/or jurisdiction to order an accused to be further remanded in custody merely to await the public prosecutor's consent?

[46] Here, we find that both the question of law as stated above can be taken and answered together as they are interrelated.

[47] Returning now to the case at hand, we find that s 177A(2) of the Criminal Procedure Code particularly the phrase 'as soon as may be practicable' contained therein, is a manifestation of the right to a speedy trial as enshrined in art 5 of the Federal Constitution. Conversely, when the appellants case is not transferred as soon as may be practicable, then that would constitute a violation of this same right.

[48] Our courts have consistently read into this right, the right to a speedy trial. His Lordship Hashim Yeop Sani J in *Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis* [1975] 1 MLJ 93 said that 'a speedy trial is certainly an unwritten right of every person accused of an offence'. This was subsequently affirmed by the Federal Court in *Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198.

[49] Section 177A(2) of the Criminal Procedure Code seems to prevent the transfer of cases to the High Court before the production of the public

prosecutor's consent, hence an accused person's case could theoretically be delayed *ad infinitum* ('infinity') through the withholding of the requisite consent by the public prosecutor.

[50] Consequently, the appellants would also be denied of their right to enter a plea to the charge, as this may only be affected post-transfer. In these circumstances, a magistrates' court would be left unable to remedy the continuing breach of the appellant's right to a speedy trial. Any further order remanding the appellants in custody may amount to a violation of their right to life and liberty as protected by art 5 of the Federal Constitution.

[51] As to the merit of the appeal, we agree with the learned counsel for the appellants, that the principle laid down by this court in *Marwan*'s case is applicable in this case. The provision in s 41A of the Dangerous Drugs Act 1952 and s 177A of the Criminal Procedure Code are similar in nature, and the purpose for which they were enacted is the same. Hence, the duty of the magistrate pursuant to s 177A of the Criminal Procedure Act is to transmit the case to the High Court once the learned deputy public prosecutor has consented to the prosecution.

[52] In this case, the charge against the two appellants was preferred by the learned deputy public prosecutor and the prosecution was initiated from the outset in the presence of the learned deputy. Therefore, there is implicit consent by the public prosecutor as the learned deputy had the authority to act as the *alter ego* of the public prosecutor. The case of *Perumal* is referred. Hence, we are of the view that the jurisdiction of the learned magistrate to transfer the case to the High Court is well within the power of the magistrate that's provided in s 177A of the Criminal Procedure Code. Thus, we found that the learned judicial commissioner had erred in law in calling up the case for revision under s 323 of the said Code and setting aside the decision of the learned magistrate.

[53] In the premise, we unanimously allowed the appeal and set aside the decision of the High Court and reinstated the decision of the magistrate court.

Appeal allowed; High Court's decision set aside and magistrate's decision reinstated.

Reported by Ashok Kumar